FOR PUBLICATION

In the Court of Appeals of the State of Alaska

Jason D. Ray, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-12135** **Order** On Remand from the Supreme Court Date of Order: **9/22/2022**

Trial Court Case No. **3KO-13-00627CR**

Before: Allard, Chief Judge, Harbison, Judge, and Mannheimer, Senior Judge.[*]

Jason D. Ray pleaded guilty to second-degree theft and, under the terms of his plea agreement with the State, Ray was sentenced to imprisonment (both active and suspended), followed by a term of probation.

Several months after Ray's release on probation, the superior court found that Ray had violated the terms of his probation. At that point, Ray announced that he wished to reject further probation, and he asked the superior court to simply impose some portion of his earlier suspended sentence.

The superior court sentenced Ray to serve 16 months of his suspended sentence, and the superior court agreed to end Ray's *supervised* probation. However, at the suggestion of the prosecutor, the court ordered Ray to serve 5 years of

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

unsupervised probation following his release from prison. The only condition of this probation was that Ray obey all laws.

Ray appealed to this Court, arguing that the superior court committed error when it found that he had violated his probation. In the alternative, Ray argued that even if he did violate his probation, the superior court had no authority to place him on probation again after he had explicitly rejected further probation — even if this additional probation was unsupervised, and even if it only required him to obey the law.

In the State's brief to this Court, the State argued that the superior court was *required* to keep Ray on probation. More specifically, the State argued that AS 12.55.-090(f) governed the situation in Ray's case, and that (under this statute) the superior court had no authority to reduce or terminate Ray's term of probation without the consent of *both* the defendant and the State, since Ray's probation was imposed as part of his plea bargain with the State.

In his reply brief, Ray argued that the State had misinterpreted AS 12.55.090(f), and that this statute did not eliminate a defendant's right to unilaterally reject probation. In addition, Ray argued that criminal defendants in Alaska have a constitutional right to reject probation; thus, regardless of how AS 12.55.090(f) should be interpreted, the Alaska legislature has no authority to enact a statute that limits or eliminates a defendant's right to reject probation.

In our original decision in this case, *Ray v. State*, 452 P.3d 688 (Alaska App. 2019), we concluded that the superior court properly found that Ray had violated the terms of his probation. We further concluded that criminal defendants in Alaska

do not have a constitutional right to reject probation — that, instead, any such right must be granted by statute.

However, this Court was unable to resolve the State's argument that AS 12.55.090(f) barred the superior court from honoring Ray's request to terminate his probation. We were unable to resolve this question because we were unable to reach a consensus, or even a two-vote majority decision, on the proper interpretation of AS 12.55.090(f). We therefore certified this issue of law to the Alaska Supreme Court. *See* AS 22.05.015(b).

The supreme court has now resolved this issue of statutory interpretation. In *Ray v. State*, 513 P.3d 1026, 1043 (Alaska 2022), the supreme court held that AS 12.-55.090(f) does indeed bar a sentencing court from reducing or terminating a term of probation that was imposed as part of a plea agreement unless both parties to that agreement (*i.e.*, the defendant and the government) consent to the modification.

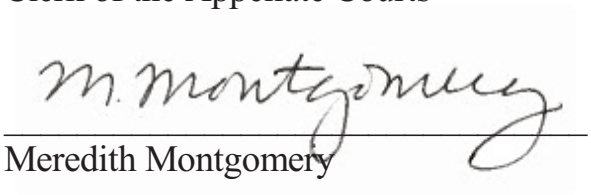
At the end of its opinion, the supreme court remanded Ray's case to this Court "for further proceedings consistent with this opinion." But between this Court's original decision and the supreme court's decision regarding the proper interpretation of AS 12.55.090(f), all of the claims of error that Ray presented to this Court have now been resolved.

Moreover, several years have passed since Ray was last sentenced — and, according to the court records and the Department of Corrections records available to us, Ray's term of unsupervised probation expired without further incident. Thus, any defect in the superior court's imposition of that unsupervised probation is now moot.

For these reasons, the judgement of the superior court is AFFIRMED, and the Appellate Court Clerk's Office is directed to close this case.

Entered at the direction of the Court, with Judge Mannheimer concurring.

Clerk of the Appellate Courts



Meredith Montgomery

Judge MANNHEIMER, concurring.

I write separately to address an issue that is potentially raised by footnote 109 of the supreme court's opinion in *Ray*, 513 P.3d at 1043.

This footnote is found at the very end of the supreme court's opinion, and it reads as follows:

> Ray argues in the alternative that the prosecutor in his case actually agreed to his request to serve no further probation, so AS 12.55.090(f) [did] not bar the [sentencing] judge from honoring that request. The court of appeals did not address this argument in its opinion and certified to us only the question of how AS 12.55.090(f) is to be interpreted. We address only the certified question and express no opinion on Ray's alternative argument.

The supreme court's file in Ray's case (File No. S-17645) shows that, when Ray briefed his case to the supreme court, he not only argued his view of the statute at issue, but he also presented a new alternative argument.

Specifically, Ray argued that even if the State's interpretation of AS 12.55.-090(f) was correct (*i.e.*, even if this statute prohibits a trial court from reducing or

eliminating a term of probation that is part of a plea bargain unless the prosecutor consents), the superior court was nonetheless authorized to terminate Ray's probation — because (according to Ray) the State's prosecutor *did* consent to the termination of Ray's probation. Thus, Ray argued, the statute was satisfied, and the superior court should have completely terminated Ray's probation when Ray announced that he wished to reject further probation.[1]

In footnote 109 of its opinion, the supreme court notes (correctly) that "the court of appeals did not address this argument in its opinion". This is because Ray never raised this claim in his briefs to this Court. When Ray argued his case to us, he never asserted that the prosecutor had consented to the termination of his probation, nor did he ever argue that, because of the prosecutor's purported consent, Ray's rejection of probation was fully consistent with AS 12.55.090(f).[2]

Because the supreme court did not close Ray's case, but rather remanded Ray's case to us for "further proceedings", Ray's case now potentially raises the following issue: When this Court certifies an issue of law to the Alaska Supreme Court, and when the supreme court accepts our certification and proceeds to entertain another round of litigation on that legal issue, can the defendant or the State raise a new claim for relief during the supreme court proceedings — a claim that was not raised during their litigation in this Court?

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[1] See Supreme Court File No. S-17645: Ray's opening brief at pp. 16–17 and Ray's reply brief at pp. 1–3.

[2] The relevant portions of Ray's briefing to this Court are found on pages 15–17 of his opening brief and on the bottom half of page 5 of his reply brief.

Given the fact that this Court hardly ever certifies an issue of law to the supreme court, it is not surprising that there is no Alaska case law on the precise question of whether a party can raise a new appellate claim after this Court has left a legal issue undecided and has certified that legal issue to the supreme court.

There are, however, appellate decisions that address analogous procedural situations. Chief among these are the Alaska Supreme Court's decision in *Alaska Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851 (Alaska 2003), and this Court's decision in *Hurd v. State*, 107 P.3d 314 (Alaska App. 2005).

In *Alaska Commercial Fisheries Entry Comm'n v. Carlson*, our supreme court confronted a lawsuit for the third time — after two prior appellate decisions, and after two prior remands to the superior court. In the third appeal to the supreme court, the State attempted to inject a new defense — sovereign immunity — into the case for the first time. The supreme court held that the State had no right to raise this new claim. Here is the supreme court's explanation:

> Successive appeals should narrow the issues in a case, not expand them. Other jurisdictions have explicitly ruled that all matters that were or might have been determined in a former appeal may not be presented in a subsequent appeal of the same case. The basis for this rule is that "[j]udicial economy and the parties' interests in the finality of judgments are in no way furthered if parties are allowed to engage in piecemeal appeals." We have expressed a similar rule in the context of res judicata, which involves subsequent suits rather than subsequent appeals. Because [the State's claim] could have been raised in earlier appeals [in this same case] but was not, and because it therefore falls outside the scope of our specific remand in *Carlson II*, we decline to address the State's "sovereign immunity" defense.

Carlson, 65 P.3d at 873–74.

Turning next to this Court's decision in *Hurd v. State*: The defendant in *Hurd* was convicted of kidnapping and third-degree assault. Because these two offenses arose from the same incident, the sentencing judge merged the two offenses under *Whitton v. State*[3] and entered only one conviction and sentence (for the greater offense, kidnapping). On appeal, this Court reversed the kidnapping verdict because we concluded that the jury was misinstructed on the element of "restraint". We therefore remanded Hurd's case to the superior court so that the State could either retry Hurd for kidnapping or, alternatively, ask the superior court to enter judgement for the lesser offense of third-degree assault.

On remand, the State told the superior court that it had decided not to retry Hurd for kidnapping. The superior court then entered judgement against Hurd for third-degree assault.

Hurd appealed a second time, attacking his third-degree assault conviction on various grounds. Some of Hurd's arguments were attacks on the validity of the jury's third-degree assault verdict — attacks that Hurd had not raised in his initial appeal. In particular, Hurd now claimed that the evidence presented at his trial was insufficient to support the jury's verdict, and he also argued that his third-degree assault conviction should be reversed for alleged flaws in the court's evidentiary rulings and for alleged errors in the jury instructions at his trial. *Hurd*, 107 P.3d at 326–27.

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[3] 479 P.2d 302, 312–13 (Alaska 1970) (interpreting the double jeopardy clause of the Alaska constitution regarding the circumstances in which two or more statutory offenses must be deemed to constitute a single "offense" for purposes of conviction and punishment).

This Court declined to consider these new claims. Instead, we held that Hurd was estopped from attacking his third-degree assault conviction by challenging the procedures, evidentiary rulings, and jury instructions at his trial — because he had previously had the opportunity to raise all of these claims when he pursued his first appeal.

This Court acknowledged that Hurd's case presented a procedural situation that did not fit exactly within the three most common claim-preclusion and anti-claim-splitting doctrines — *res judicata*, collateral estoppel, and "law of the case". *Hurd*, 107 P.3d at 327–28. Nevertheless, we held that "Alaska law prohibits parties from splitting their claims among different appeals in the same lawsuit." *Id.* at 328.

As we explained in *Hurd*, "There may be no neat label for this doctrine, but both the Alaska Supreme Court and this Court have recognized the doctrine and have applied it." *Ibid.* (citing the supreme court's decision in *Alaska Commercial Fisheries Entry Comm'n v. Carlson* and this Court's decision in *Nix v. State*, 690 P.2d 745 (Alaska App. 1984)). We then summarized this principle:

> Not only are parties prohibited from re-litigating issues that were decided in earlier appeals, but they are also prohibited from raising claims in later appeals if those claims could have been raised in earlier appeals. Whatever term the supreme court may ultimately adopt to describe this rule, the rule itself is clear: If Hurd could have presented his attacks on the procedures, evidence, and jury instructions relating to his third-degree assault conviction when he pursued his earlier appeal, then his failure to do so at that time will bar him from pursuing those attacks now.

Hurd, 107 P.3d at 329.

The governing rule is this: A party is estopped from raising a new claim in a later stage of the same appeal if that claim was already ripe when the party filed their earlier brief(s) to the appellate court.

Turning, then, to the facts of Ray's case: During the initial briefing of Ray's appeal, when the State asserted that AS 12.55.090(f) barred the superior court from honoring Ray's decision to reject any further probation, Ray could have argued that the prosecutor affirmatively consented to the termination of Ray's probation and that therefore AS 12.55.090(f) did not bar the superior court from ending Ray's probation. Because Ray could have made this argument and did not, he was barred from raising this new claim during the later litigation before the supreme court, and he is likewise barred from raising this new claim to this Court, even though his appeal is now before us for a second time.

One final note on the rule that prohibits claim-splitting: This Court has indicated that we have the authority to relax this rule "when faced with obvious error and manifest injustice". *Carpentino v. State*, 42 P.3d 1137, 1142 (Alaska App. 2002). But given the record of the superior court proceedings in Ray's case, this is not an instance of obvious error and manifest injustice.

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